WHAT IS THE COMMON LAW?

Answering Professor Burdick's contention that for several centuries prior to the time of Lord Coke "there was a true body of law in England which was known as the Law Merchant," I pointed out[2] that he himself had stated that in Coke's time

"The Law Merchant was proved, as foreign law now is. It was a question of *fact*[3]. Merchants spoke to the existence of their *customs*, as foreign lawyers speak to the existence of laws abroad. *When so proved*, a custom was part of the law of the land. This condition of things existed for about a century and a half prior to the time of Mansfield."

And I asked if there was ever "a true body of law in England or elsewhere, the existence of which had to be *proved;* law which the *judges* had never heard of; law which "was part of the law" only *after evidence to that effect* had been adduced? In a short commenting note the Professor said: "I do not see that it calls for a serious reply."

I pointed out too that during the one hundred and fifty years between Coke and Mansfield (during which, as the Professor contends, the term law merchant "loses much of the definiteness which characterized it" prior to that period) so little progress was made in the development of "a true body of (merchant) law" that Buller J. (Mansfield's colleague) declared that

"Before Lord Mansfield's time we find that in the Courts of law all the evidence in mercantile cases was thrown together; they were left generally to the jury and they produced no established principle."[4]

and that Professor Burdick himself quoted Scrutton to the same effect:—

"As a result *little was done towards building up any system of mercantile law in England.*"

The question presents itself therefore in this fashion: Prior to Coke "there was a true body of law in England which was known as the Law Merchant"; after a further

[1] 2 COLUMBIA LAW REVIEW 470.

[2] 3 COLUMBIA LAW REVIEW 135.

[3] All italics are those of the present writer.

[4] Lickbarrow *v.* Mason (1787) 2 T. R. 63.

century and a half it may truthfully be said, that little had been "done towards building up *any* system of mercantile law in England" and that "*no* established principle" had been produced; Quaere, who had stolen that "true body" and where was it? To all this the Professor said, "I do not see that it calls for a serious reply."

I also pointed out that at the end of the one hundred and fifty years Lord Mansfield set to work to develop a body of rules for himself. Professor Burdick acknowledges this. He says that Lord Mansfield

"reared a special body of jurymen at Guildhall, who were generally retained in all commercial cases to be tried there. He was on terms of familiar intercourse with them, not only conversing freely with them, but inviting them to dine with him. From them he learned the usages of trade, and in *return* he *took great pains in explaining to them the principles of jurisprudence by which they were to be guided.* When a mercantile case came before him, he sought to discover not only the mercantile usage which was involved, but the legal principle underlying it. The great study has been to find some general principle, not only to rule the particular case under consideration, but serve as a guide for the future. It was from such sources, and from the current usages of merchants, that he *undertook to develop a body of legal rules* which should be free from the technicality of the common law, and whose principles shall be so broad, and sound, and just, *as to commend themselves to all courts in all countries.*"

And I ventured to ask: Why all this bother? That "true body of law" which had existed in England "for several centuries" prior to Coke's time, must have been discoverable somewhere and somehow. Why did not Mansfield hunt it up? Why not issue a "general warrant," if need be, for its production? Thousands of people knew it by heart; and had been swearing to it, hoping for generations to get the judges enlightened upon the subject. Why not call another witness? History does not tell us that anybody had stolen all of them too. Why did Mansfield undertake "to develop a body of legal rules"? Was it because theretofore "*no* established principle" had been "produced"? If so, how could there have been, prior to Mansfield, "a true body of law in England which was known as the Law Merchant"? And the only answer is, "I do not see that it calls for a serious reply."

Endeavoring to sink the Law Merchant notion I linked it with the "Common Law"—"the most impudent pre-

tender of all these phantom laws"[1]—but perhaps I did not sufficiently prove that the appendage was a sinker. The Professor would suggest that it was a float. Was there then a true body of law in England which was known as the Common Law?

Names are largely unimportant, so long as the things signified are rigidly determined. If, for example, you chose to call judges' decisions the "Common Law," I shall not quarrel with you. For my part I should much prefer to denominate such law "Judicial Legislation"[2], or "Judiciary Law."[3] But if you say that the Common Law was, or is, a true body of law, with existence *separate* from the decisions; or if you use the words indiscriminately, meaning, now, the decisions, and, now, something else, definable or otherwise, I venture to disagree and to protest.

Let us have some one meaning. Have we three sets of laws: (1) the Common Law, (2) the decisions, and (3) the statutes? or have we four sets: these three plus Equity? or really five: (1) the Common Law (in nubibus), (2) Equity (in nubibus), (3) Common Law decisions, (4) Equity decisions, and (5) statutes? Or only two: decisions and statutes?

For example, have we Equity law apart from Equity decisions? We have no doubt, as Dr. Bryce tells us, a

"regard for substantial, as opposed to formal and technical justice, the kind of conduct which would approve itself to a man of honor and conscience"[4];

or, as we might more shortly say, a regard for justice (for formal and technical justice is usually not justice but injustice); but was there, or is there "a true body" of Equity law anywhere but in the decisions?

Of course nobody ever thought that there was.[5] Very well, now where did the Common Law decisions come from?

[1] The Law of Nature; the Law of Nations; the Law of God; the Law of Reason; the Law of the Universe, &c.

[2] See Pomeroy's Equity Jurisprudence, p. 66; and Mr. Justice McClain's paper read before the American Bar Association, 1902.

[3] Bentham's phrase: Principles of Morals and Legislation, p. 8.

[4] Studies in History and Jurisprudence, 581.

[5] Mr. Pomeroy tells us that the early Chancellors were guided by "their own individual consciences, by their moral sense apprehending what is right and wrong, by their own conception of bona fides": Equity Jurisprudence § 50.

The Equity judges developed their system empirically; applying notions of justice to cases as they arose. What did the Common Law judges do? The answer is simple: Roman law and other precedents apart, these judges went to precisely the same source as their Equity brethren; they went to their notions of justice—until they took to following their own precedents, and then the Equity men came along and helped them out of the ruts they had themselves cut, and swore they were bound to run in.

Distinguish between local customs and notions of justice. Customs have to be proved. They are not law until shewn to conform to the requisites of the legal conception of a custom.

"Usage once recorded upon evidence given, immediately becomes written and fixed law" [1].

"There can be no law without a judicial sanction, and until a custom has been adopted as law by courts of justice, it is always uncertain whether it will be sustained by that sanction or not" [2].

Commenting upon which Mr. Lightwood says[3]:

"We have thus arrived at the result that all law is, in the last resort, the creature of the sovereign, that it is made immediately either by the sovereign or by a subordinate; but that in the latter case it exists as law by the Sovereign's assent, either express or tacit; and it is made either directly by way of statute, or *obliquely by way of judicial decision.* These are decided to be the only modes in which law can be made, and hence it does not exist by virtue of being customary, or of being in accordance with legal opinion, or with natural law. *These facts may be reasons for its adoption as positive law,* but it does not become such until the Sovereign has adopted it in the manner above described, either immediately or mediately, either directly or obliquely."

Customs, then, we understand, and the best way to contrast them with our notions of justice is to say that it is by notions of justice that customs are accepted or rejected—are declared to be fit or unfit to become law. It is exactly at this point that Professor Burdick, if I may so say, goes wrong. He sees merchants plying their business according to fairly well understood but very general customs of very uncertain definition, and he imagines these customs or methods to have been laws—to have formed indeed "a true body

[1] Maine's Village Communities, 72.

[2] Austin's Lectures on Jurisprudence II, 564.

[3] The Nature of Positive Law, 359.

of law"; not observing that upon any difference of opinion arising between two of these merchants, the courts had to ascertain which of the contentions was the more in accordance with notions of justice; to determine which of them was to be the law; and that in this way the courts

"have incorporated it (usage) in what is called the law merchant, and have made it part of the common law of the country"[1]

Is it not true that

"the proper idea of a rule of law[2] is that it is an attempt to sum up current opinion upon a class of cases".[3]

an attempt (oftimes a poor effort) to sum up current opinion as to what is justice in relation to the class of case in hand.

"Law is declared, it is not made; it is a *discovery*, a statement of the conditions under which, as wise men have shewn, life can be lived".[4]

Customs, usages, notions, there were no doubt in abundance, prior to the decisions, but was there any law except "in crudest condition and regulative of simplest transactions"[5]—was there "a true body of law in England known as the common law"; a body of law which not merely furnished enlightenment for the courts, but which, being a *true* body of law, was binding upon the courts? And was that "true body of law" something which the judges had never officially heard of, something which they had to ascertain as best they could from the mouths of contradictory witnesses?

There is a very short way of settling such questions. If any one says that there was or is "a true body of law" known as the "Common Law" (apart from the decisions) let him quote for us, or otherwise authoritatively refer us to, a single item of it. The Leges Barbarorum we know; the Laws of Justinian we know; the Laws of the Twelve Tables (B.C. 500) we know; even the Laws of Hammurabi of Babylon (B. C., say, 2250) we now know, and can quote from. Will somebody please furnish us with an extract from the Common Law of England?

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[1] Edelstein *v.* Schuler [1902] 2 K. B., 144.

[2] A judicial rule of law.

[3] Lightwood: The nature of Positive Law, 226. And see the whole chapter—Ch. X.

[4] Jenks: Law and Politics in the Middle Ages, 301–2.

[5] 3 COLUMBIA LAW REVIEW 144; note.

Surely this can easily be done. Go to the law reports and read to us. The judges, if they were deciding according to this "true body of law" will undoubtedly so indicate. No, these modern judges seem to know nothing of it. Open then these musty Year Books; thumb them all. No? Try the Rolls—back as far as John's reign. Nothing there? Well, don't despair; in the works of Bracton (Chief Justiciar of England 1265–1267) or in those of Glanvil (the oldest writer on English jurisprudence, and Chief Justiciar of England in the reign of Henry II) there must be some trace of this "true body." Not a word?

Well, where did these judges and writers get the law that they tell us of? Mr. Justice McClain would answer

> "By ascertaining what it was customary for English judges to decide in like cases. The reading of Bracton himself beyond the introductory pages proves conclusively the fact * * * He refers to *decisions of the courts*, although he is compelled to do so from current or personal knowledge, as reported decisions were as yet apparently unknown, and instead of announcing general principles, borrowed from code, or pandects, or digests, he tells us what was decided in an assize of mort d'ancestor &c. * * * His successors were the digesters and abridgement-makers—Fitzherbert and Brooke and Rolle and Viner—and these men concerned themselves with *the decisions of the English judges* and prepared the way for Coke and Hale and Blackstone, the great expounders of the distinctively English system of law." [1]

If I am to be told that nobody says that anybody can give extracts from the common law, and that what is meant is that the Common Law consisted of certain well-known principles upon which the decisions were based, then I ask profert of one of these principles. And if it be alleged that production is impossible, for that the said principles were in the mind, or heart, or consciousness, or liver, or legs, of the people, and not otherwise or elsewhere, I still require at least a hint as to what they looked like before believing in their corporeality.

Perhaps they were mere ethical conceptions—conceptions supposed to be very clear and easily definable until somebody attempted to analyse and apply them. To you

[1] Address before the American Bar Association, 1902. The learned judge does not permit the Civil Law the influence which the present writer would attribute to it; but there can be little doubt that Bracton and Glanvil, whether they made much or little appeal to Roman Law, made none whatever to any "true body of law" known as the common law.

who have what you assume to be very certain and even rigid notions as to the compelling requirements of veracity, of justice, of purity, of benevolence, of the duty to act rationally, to govern the lower parts of your nature by the higher, and so on—to you, I say, read Professor Sidgwick's "Methods of Ethics", and perhaps you will arrive at his conclusion:—

"We have examined the moral notions that present themselves with a *prima facie* claim to furnish independent self-evident rules of morality; and we have in each case found that from such regulation of conduct as the common sense of mankind really supports, *no proposition can be elicited which, when fairly contemplated, even appears to have the characteristic of a scientific axiom*"—although no doubt there may be "*a rough general agreement*, at least among educated persons of the same age and country" [1]

Yes; prior to the decisions there was "a rough general agreement" as to the principles which ought to regulate the relations and transactions of people "of the same age and country", but (with deference to Professor Burdick) I object to that "rough, general agreement" being called "a true body of law." I take the liberty of agreeing with one of the best of the American authors (Mr. Pomeroy) when (speaking of the appointment by William I of a Chief Justiciar—"a permanent judicial officer * * * having supreme jurisdiction throughout England") he tells us that, prior to that period, law was administered by the Saxon local folk—courts having for officials no professional judges, and for laws a "mass of arbitrary rules and usages" [2]. The new professional judges, with supreme jurisdiction throughout England, at once commenced the work of "reducing the tangle of customs to order" [3]; commenced the construction of that

"science which has for its ultimate aim the ascertainment of rules which shall regulate human relations in accordance with the common sense of Right" [4].

Let Mr. Pomeroy continue:—

This "initial activity *in creating the common law of England* was done, not by parliamentary legislation nor by royal decrees, *but by the justices in their decisions* of civil and criminal causes" [5]. "In this work of

[1] P. 360. [2] Equity jurisprudence, § 13.

[3] Bryce: Studies in History & Jurisprudence, 763.

[4] Lightwood: The Nature of Positive Law, 36.

[5] Equity Jurisprudence, § 13.

constructing a jurisprudence, the early common law judges, as well as the Chancellor, at a later day, drew largely from their own knowledge of the Roman law. The evidence, both internal and historical, is conclusive that the Common Law of England in its earliest formative period, was much indebted to that Roman jurisprudence which enters so largely into the judicial systems of all the western nations of the European Continent " [1].

Pause there for a moment—" the Common Law of England in its earliest formative period was much indebted to the Roman jurisprudence." In what sense are we using the words " the Common Law of England "? Do we mean " the arbitrary rules and usages " of the folk courts—the only things that look like laws before William's Chief Justiciar got to work? Or do we mean the " rough, general agreement " of the people? Or do we not mean that the judges got some light from the civil law?—that the *decisions* were colored by Roman jurisprudence? " The Common Law was much indebted to the Roman jurisprudence." If we mean by this the decisions, would it not be better to say so?

When Mr. Pomeroy speaks of

" building upon the Common Law with materials taken from the never-failing quarries of the Roman legislation "[2]

or declares that

" the ancient Common Law rigidly exacted all penalties "[3]

or indicates that

" the ancient Common Law paid great deference to matters of pure forms "[4]

everybody understands him ; and every lawyer (well, nearly every lawyer) would use the words " Common Law " in the same sense. Turn back to the Year Books of the 14th Century and the meaning is the same:—

" Audita Querela is given rather by Equity than by Common Law "[5].

" And this suit is ordained by Parliament because I cannot have a recovery at Common Law "[6].

Let us look at the matter concretely. The courts have been examining lately some very modern developments in social relations, and adding " Boycott " and " Strikes " to the digests as additional headings. Now from what source

[1] § 14. [2] § 15. [3] § 72; and see 381. [4] § 379.
[5] 17 Ed. III, 370. [6] Ib. 386.

are the Judges getting the law upon these subjects? Is it out of that gaseous Common Law which if one may surmise has existed from all eternity (for no one has ever heard of its creation, or other genesis)? Or are we to believe in special divine inflations for the birth of each new opinion—veritable modern Themistes, instead of the apocryphal inspirations of ancient days? Before trusts and combinations commenced to affright us the English courts had little difficulty in asserting that

"it is vain to say that a thing might have been done by an individual but cannot be done by a combination of persons"[1].

Now-a-days, however, they go much more warily, if very much less logically and lucidly, with the result that Mr. Haldane (in the front rank of English Counsel), undertaking to explain the two latest judgments of the House of Lords[2], is forced to acknowledge that he does not understand them himself[3] and must perforce await further revelations (of the common law?) at the hands of the judicial mediums.

Heaven apart, whence are the Judges getting this new law? It is not in the statutes, nor is it in the decisions. Whence then? From the common law enwrapped in the palpitating tissues of the heart of the people, or its diaphram? The soul, as everybody knows, locates itself in the —well, perhaps we have trouble enough on hand for the present. But this common law—do somebody tell us where it is and what it is, and is it like anything that we know something about? Is it regulating the trusts at present, do you think? And, if so, is it making much of a job of it?

[1] Mogul Steamship Co. *v.* McGregor [1892] A. C. 25.

[2] Allen *v.* Flood [1898] A. C. 1; Quinn *v.* Leathem [1901] A. C. 495.

[3] "These decisions (he said) disclose divergencies of view amongst distinguished men which make it hopeless for anyone to try to say with accuracy or certainty what the law is. Speaking for myself, I should be very sorry to be called on to tell a Trade Union Secretary how he could conduct a strike lawfully. The only safe answer I could give would be that having regard to the diverging opinions of the judges, I did not know." (Contemporary Review March, 1903, 368). But why not take a look, Mr. Haldane, at the Common Law? Why, upon the theory that judges merely expound and interpret the Common Law, not read and expound a little yourself? Why? Because each judge is consulting, not any body of law, "true", "common", or otherwise, but is declaring what to him with all his personal idiosyncracies, his dreads, his antipathies, his sympathies, his forecasts, his characteristics and mental climate—what to his particular brain, appears to be best.

Judges applying their notions of justice to new conditions, we can all understand; and to certain people that is what they seem to be doing, in this business of manufacturing trust and strike law. But the idea of judges laboriously delving into nothing, nowhere, and pretending that they are unearthing primeval aphorisms, axioms and principles, placed there by omnipotence or by nature (by behemoths, just as likely) for use in these later stages—well, for one, I dont believe it. And is the Common Law only one law, since the noun is in the singular? or is it one compressed epitome of all law, some primeval protoplasmic germ with wonderful evolutionary potentiality, from which everything else shall in good time proceed? Radium, we learn, is untiring and unremitting in its emanation of X rays, electrons, and particles of matter (exploded atoms, they say), and never is it a whit the poorer or the weaker —is the Common Law anything like radium?

Consider also our laws of estoppel and waiver: think you that we shall ever dig them up, either in London or Washington? or for them too must we go to "judicial legislation" alone?

Or take our maritime law: where did it come from? Out of the Common Law? or from Lord Stowell principally? For example, the master of a ship can under certain circumstances bind a cargo by respondentia bond; was that law derived from eternal protoplasm? or was it "from the general policy of the law"—the general policy of Lord Stowell, we may say? Seamen's lien for wages, salvage, &c.: are these laws founded upon imperishable memories of some Edenic or at least Noachean code? shall we say that they were discovered in the Pleistocene? or shall we confess that their creator was the modern Lord Stowell?

Turn to the law of bills and notes, and you change the founder merely, not the foundation or the methods of building. Here Lord Mansfield is at work; Lord Stowell there. And there is no more Law Merchant in the one case, than Law Ship-owner in the other. Days of grace are given by law because of the previous *custom* of Merchants—just as thirteen shrimps go to the dozen—that is because in the bill case ten days really meant thirteen, and in the shrimp case twelve meant thirteen. This is neither Law Merchant, nor

Law Shrimp, but a well-known bit of the law of contracts.

Getting away from this feature (the contractual feature) of the law of bills and notes, and examining the slow evolution of the general law relating to the subject, one cannot do better than quote from Professor Thayer's excellent treatise upon "Evidence at the Common Law". At the inception of some question there is usually, not a fixed Common Law to go to, but on the contrary a very wide difference of opinion; and this is followed "by fixing *in particular cases* an outside limit of what is rationally permissible", and then, step by step growing more precise:—

"In this way the legal rule as to what is reasonable notice of the dishonor of a bill of exchange was established: juries were resisted by the court, when they sought to require notice within an hour, and on the other hand when they tried to support it if given within fourteen days, or even within three days when 'all the parties were within twenty minutes walk of each other' (Tindall *v.* Brown, 1 T. R. 168–9); and *so the modern rule was fixed* that ordinarily notice is sufficient if given on the following day"[1]. "*The process is now going on as* regards the question of timely notice to the indorser of a demand note"[2].

What a pity, after all, that there was not a "Law Merchant" or a Common Law wherewith to settle long ago all these age-long controversies; or if indeed there was one, that it has been so irretrievably lost. But cheer up; we may yet hope? In London the other day a pachyderm which had lain lost for, it is computed, some 150,000 years was accidentally dug up.

JOHN S. EWART.

[1] P. 214, 215, 226.

[2] P. 215. Citing Paine *v.* R. R. Co. (1885) 118 U. S. 152, 160.